



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 9, 2010

VIA FACSIMILE AND FIRST CLASS MAIL
(202) 434-1690

Marc Elias, Esq.
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003

RE: MUR 6234
Friends of Mary Landrieu, Inc.

Dear Mr. Elias:

On December 3, 2009, the Federal Election Commission (the "Commission") notified your clients, Friends of Mary Landrieu, Inc. and Nancy Marsiglia, in her official capacity as treasurer, (the "Committee") of a complaint alleging that the Committee violated the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by the Committee, the Commission, on June 29, 2010, dismissed the allegation that the Committee violated 11 C.F.R. § 103.3(b)(1) or (2) and the related reporting requirements by disgorging the contributions at issue. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

You are advised that the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) remain in effect, and that this matter is still open. The Commission will notify you when the file in this matter has been closed.

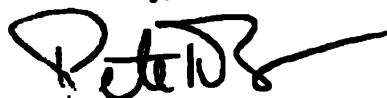
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Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

If you have any questions, please contact Marianne Abely, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Blumberg", with a long horizontal flourish extending to the right.

Peter Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

**RESPONDENT: Friends of Mary Landrieu, Inc. and,
and Nancy Marsiglia, in her official
capacity as treasurer**

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I. INTRODUCTION

This matter was generated by a complaint filed by Citizens for Responsibility and Ethics in Washington ("CREW"). See 2 U.S.C. § 437g(a)(1).

The complaint alleges that the Friends of Mary Landrieu, Inc. and Nancy Marsiglia, in her official capacity as treasurer, ("Landrieu Committee") violated the Federal Election Campaign Act of 1971, as amended, ("the Act") by disgorging \$25,300 in illegal contributions to the United States Treasury ("Treasury"), instead of refunding the contributions to the contributors. 11 C.F.R. § 103.3(b)(1) & (2). The complaint also asserts that the Landrieu Committee should have disclosed the required refunds to those contributors in accordance with 11 C.F.R. § 104.3(b)(2)(v)(A). In addition to requesting that the Commission find reason to believe that the Landrieu Committee violated the Act and impose appropriate sanctions, CREW requests that any information the Commission obtains during the course of its inquiry be referred to the Department of Justice for investigation of possible violations of 2 U.S.C. §§ 441b(a) and 441f.

The Landrieu Committee denies violating the Act or Commission regulations with respect to disbursing the \$25,300 to the Treasury and urges the Commission to dismiss the matter. The Landrieu Committee states that because it had sufficient information to question the legality of these contributions and was unable to determine the identity of the original contributor(s), its decision to disgorge the funds to the Treasury was

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permissible and compatible with the guidance provided by the Commission in both Advisory Opinions ("AOs") and in Matters Under Review ("MURs").

II. FACTUAL BACKGROUND

In May of 2008, the Landrieu Committee received a series of six contributions payable by cashier's checks issued by Whitney National Bank in New Orleans, LA. The contributions, which totaled \$25,300, were forwarded to the campaign by a Louisiana attorney who the Landrieu Committee has declined to identify. At some point after receiving these funds, the Landrieu Committee became suspicious that the contributions were from a prohibited source or had been made in the name of another because they were received as sequentially numbered checks from the same bank.¹ The Landrieu Committee, which apparently obtained the names of the putative contributors from the Louisiana attorney, attempted to confirm the legality of each contribution by contacting these individuals by mail and telephone. One of these individuals told the Committee that she had no knowledge of making any contribution to the campaign. Based on this information, the Landrieu Committee concluded that there was "sufficient basis to question the lawfulness" of each contribution forwarded by the Louisiana attorney. The Landrieu Committee states that it "took immediate remedial action" by making a \$25,300 disbursement to the Treasury because it was unable to discover the identities of

¹ The Landrieu Committee did not identify the Louisiana attorney who forwarded the subject contributions, specify from what source it obtained the names of the individual contributors, provide any details regarding the contributions such as the amounts of each contribution and the date of receipt, or describe what efforts were made to discover the identity of the original contributor(s). The Landrieu Committee stated that the sequential numbering of the contribution checks from the same bank caused it to seek to confirm the legality of the six contributions forwarded by the same Louisiana attorney.

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the original contributors. The Landrieu Committee described the August 7, 2008, disbursement in its 2008 Pre-Primary report as a "donation."²

CREW contends that the Landrieu Committee violated 11 C.F.R. § 103.3(b)(1) & (2) when it disgorged the \$25,300 to the Treasury rather than return the funds to the contributors. According to the complaint, sections 103.3(b)(1) and (2) require committees to return contributions to the contributors when they suspect or later discover that a contribution is illegal. Citing a series of AGOs, the complaint contends that the Commission does not permit political committees to disgorge illegal contributions at will, but only permits such disgorgement in "one unique situation" when the committee learns that the Justice Department is pursuing a criminal investigation or prosecution relating to the contributions.

The Landrieu Committee denies that disgorging the \$25,300 to the Treasury violated the Act or Commission regulations. According to the Landrieu Committee, it followed Commission advice in making a disbursement in an amount equal to the contributions to the Federal government, state or local governments, or to a qualified charity when there is a "factual dispute as to the actual source of the contributions." The Landrieu Committee contends that its decision to disgorge the contributions was permissible because it had sufficient reason to question the legality of the contributions and could not determine the identity of the original contributor(s). The Landrieu

² An online news article attached to the complaint attempts to link the donation to a Senate Ethics Committee investigation of Senator Landrieu's 2001 request for an earmark for the Voyager Expanded Learning literacy program, which also apparently stemmed from a CREW complaint. (Arthur Delaney, *Why Did Sen. Landrieu's Campaign Donate \$25,300 to the Government*, HUFFINGTON POST.COM, November 13, 2009). Nevertheless, it does not appear that anyone who worked for Voyager Expanded Learning or its affiliate Best Associates contributed to the Landrieu Committee in May of 2008.

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Committee asserts that in similar cases, the Commission has advised political committees to disgorge contributions of questionable legality where identified donors do not confirm their legality and where the committee cannot determine the identity of the original contributor. Citing AOs 1995-19 (Indian-American Leadership Fund) and 1991-39 (D'Amato), the Landrieu Committee contends that the Commission has "never required" evidence of indictment, conviction, or formal investigation before advising political committees to disgorge illegal contributions. The Landrieu Committee also notes that in enforcement cases such as MUR 5279 (Kushner)(2004) the Commission has requested that political committees "either refund *or disgorge*" illegal contributions within 30 days even if they know the identity of the contributor. (emphasis in original).

III. LEGAL ANALYSIS

During the 2008 election cycle, the Act provided that no person shall make contributions to a candidate for federal office or his or her authorized political committee, which in the aggregate exceeded \$2,300 for the primary and general elections, respectively. 2 U.S.C. § 441a(a)(1)(A). Under the Act, corporations and national banks are prohibited from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a). Corporate officers are prohibited from consenting to contributions made by the corporation or national bank. *Id.* It is unlawful for a political committee to accept or receive any contribution prohibited by 2 U.S.C. § 441b(a). The Act also provides that no person shall make a contribution in the name of another person. 2 U.S.C. § 441f. It is a violation of the Act to knowingly help or assist any person in making a contribution in the name of another. 11 C.F.R. § 110.4(b)(iii). Political committees are not liable for the

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receipt of impermissible contributions provided the committees adhere to the safe harbor regulations set forth in 11 C.F.R. § 103.3(b)(1) & (2).

Committee treasurers are responsible for examining all contributions for evidence of illegality. 11 C.F.R. § 103.3(b). Contributions that, when received, present genuine questions as to whether they were made by corporations, labor organizations, Federal contractors, or foreign nationals may either be deposited into a campaign depository or returned to the contributor within ten days of receipt. 11 C.F.R. § 103.3(b)(1). If any such contribution is deposited, the treasurer shall make his or her best efforts to determine the legality of the contribution and make a refund if it cannot be determined to be legal. *Id.* The treasurer is deemed to have made best efforts only if s/he made at least one written or oral inquiry concerning the legality of the contribution. *Id.* Evidence of legality includes a written explanation from the contributor, or an oral explanation which is noted by the treasurer in a subsequent memorandum. Explanation and Justification, *Deposits of Receipts and Disbursements*, 52 Fed. Reg. 6, (Jan. 9, 1987) at 768. If the contribution cannot be determined to be legal, the treasurer shall, within thirty days of receipt, refund the contribution to the contributor. 11 C.F.R. § 103.3(b)(1).

When the treasurer of a political committee deposits a contribution and, based on new evidence not available to the political committee at the time of receipt and deposit, discovers that it came from a prohibited source or was made in the name of another, the treasurer shall refund the contribution within thirty days of the date on which the illegality was discovered. 11 C.F.R. § 103.3(b)(2). Political committees are required to disclose contribution refunds as disbursements on their periodic reports to the Commission. 2 U.S.C. § 434(b)(4)(F) & (5)(E); 11 C.F.R. § 104.3(b)(2)(v)(A).

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In several early Advisory Opinions, the Commission advised political committees that they must refund illegal contributions to the person or entity that was the actual source of those contributions. See AO 1984-52 (Russo) and AO 1989-5 (Ray) (contributions financed by corporations through sham employee bonuses should be refunded to the corporate sources and not the employee conduits). Contrary to the assertions made in the complaint, however, the Commission has not always required refunds pursuant to section 103.3(b) and has never made the involvement of the Justice Department a prerequisite for disgorgement. The Commission has recommended disgorgement where the available evidence raised doubts as to the legality of the contribution, but there was a factual dispute as to the actual source of the contribution. AO 1995-19 (Indian-American Leadership Fund) and AO 1991-39 (D'Amato). In AO 1996-5 (Jay Kim for Congress Committee), the Commission gave the political committee the option of disgorging the funds to the Treasury instead of the original contributor, a corporation that had pled guilty to making illegal contributions. AO 1996-5 explicitly superseded AOs 1984-52 and 1989-5 and earlier Advisory Opinions to the extent they determined that payments could only be made to the entity that was the actual source of the illegal contribution.

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The available information indicates that the Landrieu Committee received contributions in May 2008 that it came to believe were prohibited or made in the name of another. Although there is no information as to the specific date(s) that it became aware of the contributions' likely illegality, there is no reason to question that it took immediate steps to rid itself of the funds within the applicable regulatory timeframe. See 11 C.F.R. § 103.3(b). While section 103.3(b) mandates refunds to contributors, requiring that the Landrieu Committee refund these illegal contributions would be difficult, given the Committee's stated inability to locate the original source(s) of the funds and because recent Commission decisions have permitted disgorgements. In the numerous AOs and MURs referenced *supra* at 6, the Commission has advised or instructed political committees to disgorge illegal contributions even in cases where the name(s) of the original contributor(s) were known.

³ The Commission's practices with respect to disgorgements and refunds were at issue in *Fireman v. United States*, 44 Fed. Cl. 528 (1999). In *Fireman*, a political committee, in reliance on AO 1996-5, disgorged to the Treasury illegal contributions it had received from Simon C. Fireman and his company after the political committee's treasurer learned that Fireman had pled guilty to making illegal contributions. *Id.* at 530. Fireman filed suit against the government to recover the amount of the disgorged illegal contributions from the Treasury, arguing that Commission regulations required political committees to refund illegal contributions to the contributors, and that any AOs permitting disgorgement instead of refund are contrary to Commission regulations and beyond the Commission's authority. While the Court did not explicitly rule on whether the Commission exceeded its authority in AO 1996-5, it did find that Fireman "presented a prima facie case that the FEC acted without authority in its decision in AO 1996-5." *Id.* at 537. The court further stated that the language in the regulation "seems clear enough on its face" and that "11 C.F.R. 103.3(b)(2) authorizes the return of illegal campaign money." *Id.* at 538-9. Because the Commission had changed its position from earlier AOs, the Court noted that the "new interpretation is entitled to less deference." *Id.* at 538 (citing *Poulos v. FirstEnergy Adams, Inc.*, 501 U.S. 658, 668 (1991)). The *Fireman* decision concludes that section 103.3(b)(2) essentially confers a right or expectation on the contributor that its illegal refund will be refunded. After *Fireman*, the Commission began requesting that contributors in MURs involving illegal contributions sign waivers of their refund rights when disgorgements were required. See MUR 6074 (Jacobs)(2008).

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Accordingly, the Commission dismissed the allegations that the Friends of Mary Landrieu, Inc. and Nancy Marsiglia, in her official capacity as treasurer, violated 11 C.F.R. § 103.3(b)(1) or (2) and the related reporting requirements by disgorging the contributions at issue in this matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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